

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 Advocates for Responsible Development
3 and John Diehl,

4
5 Petitioners,

6 v.

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8 Mason County,

9
10 Respondent.
11

Case No. 06-2-0005

**ORDER ON COUNTY'S MOTION FOR
RECONSIDERATION – SEWER PLAN**

12 THIS Matter comes before the Board upon the County's motion for reconsideration¹ of the
13 Board's compliance order of November 14, 2007.² Petitioner opposes the motion.³
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15 In this order, the Board finds that the County seeks to rely upon evidence it did not present
16 at the hearing (Index Nos. 397, 399, 428, and Exhibit A to the motion for reconsideration); or
17 upon "oral testimony" when no sworn testimony was admitted at the hearing. Allowing
18 consideration of such evidence after the decision has been issued would not be appropriate
19 if the Petitioners sought to offer it nor is it appropriate (as here) when the County offers it.
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21 The County also points to exhibits that were submitted with its reply brief and these show
22 additional funding for Phase I of the Sewer Plan. Although the Sewer Plan was not
23 amended to indicate these sources, the Board agrees that the exhibits show some (but not
24 all) of the needed additional funding for Phase I and will modify its findings of fact to reflect
25 these additional funds.
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31 ¹ Mason County's Motion for Reconsideration Re: Belfair UGA Sewer

32 ² Compliance Order on Plan and Development Regulations – Sewer in Belfair UGA, November 14, 2007.

³ Petitioners' Response to County's Motion for Reconsideration

1 However, the Board notes that the revision of the Mason County Capital Facilities Plan to
2 include "the actual costs for the Belfair Sewer"⁴ for 2007-2012 is a legislative action upon
3 which a request for a finding of compliance could be based. The Board would grant an
4 expedited compliance schedule and hearing date to consider compliance on the basis of
5 legislative action that was not presented earlier but which might form a basis for a
6 compliance finding on one or more issues in this case.
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8 **DISCUSSION**

9 **Positions of the Parties**

10 The County urges that the Board erred factually and legally in our November 14, 2007
11 order. First, the County alleges that the Board incorrectly concluded that \$8.4 million of the
12 Belfair Sewer Plan remains to be financed.⁵ (Findings of Fact 34 and 35 and Conclusions of
13 Law E). Second, the County argues that the "written evidence and oral testimony at the time
14 of hearing" supports the premise that there are no additional dollars required to complete
15 Phase I of the Belfair Sewer Project.⁶ The County argues further that the Sewer Plan
16 clearly outlines "a proposed structure to finance the sewer, pay for operation and
17 maintenance costs, and recover capital costs for future sewer construction."⁷ (Findings of
18 Fact No. 32 and 36, and Conclusion of Law E).
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20 Third, the County argues that Findings of Fact Nos. 16, 19 and 22 and Conclusions of Law
21 C-H are in error because the Capital Facilities Plan outlines a blueprint for the sewer
22 development of the East and North Belfair UGA areas.⁸ The County argues that it
23 anticipates that developer funding and general facility charges will be available to
24 "encourage and supplement developer-assisted sewer development."⁹ Fourth, the County
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29 ⁴ Mason County's Motion for Reconsideration Re: Belfair UGA Sewer at 5.

30 ⁵ Mason County's Motion for Reconsideration Re: Belfair UGA Sewer at 2.

31 ⁶ *Ibid.*

32 ⁷ *Ibid.*

⁸ *Ibid* at 3.

⁹ *Ibid.*

1 argues that these same findings of fact and conclusions of law are erroneous because
2 Ordinance 90-17 mandates urban density lots precluding a "barrier lot" between the
3 development and the sewer line.¹⁰
4

5 Fifth, the County argues Findings of Fact No. 22 and Conclusions of Law C-H are in error
6 because on-site sewer systems are considered to be interim sewage disposal system
7 methods.¹¹ Because the Facility plan declares that the entire UGA will be served by the
8 Belfair Sewer System, the County argues, there will eventually be sewer connections
9 throughout the UGA.¹²
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11 Finally, the County admits that it inadvertently submitted an incomplete 2007-2012 Capital
12 Facilities Plan work sheet.¹³ The 2007-2012 Mason County Capital Facility Plan has been
13 revised to reflect the actual costs for the Belfair Sewer, the County maintains, and illustrates
14 the continued commitment to sewer development in the North and East Belfair areas.¹⁴
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16
17 Petitioners respond that three of the exhibits that the County cites on reconsideration were
18 not attached to the County's pre-hearing brief nor presented at the hearing.¹⁵ The
19 Petitioners assert that new information about funding might form a basis for a compliance
20 hearing under either RCW 36.70A.302 or 36.70A.305 but not for reconsideration.¹⁶
21 Moreover, Petitioners maintain that there is still no "firm funding for sewer service beyond
22 the first phase".¹⁷ Findings of Fact Nos. 32, 34, 35 and 36; Conclusion of Law E).
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28 ¹⁰ *Ibid* at 4.

29 ¹¹ *Ibid*

30 ¹² *Ibid*.

31 ¹³ *Ibid*.

32 ¹⁴ *Ibid* at 5.

¹⁵ Petitioners' Response to County's Motion for Reconsideration at 1.

¹⁶ *Ibid* at 1-2.

¹⁷ *Ibid* at 2.

1 As to the challenges to Findings of Fact 16, 19 and 22; Conclusions of Law C-H; the
2 Petitioners argue that the lack of specificity makes it difficult to address the claim of error.¹⁸
3 Petitioners assert that the County only “conjectures” about a means of financing but
4 provides no assurance of such achievement.¹⁹ The challenges to Findings of Fact 16, 18,
5 21, 24 and 29 and Conclusions of Law C-H discuss a “barrier lot”, Petitioners point out that
6 the Board does not refer to a “barrier lot” in its decision.²⁰ As to Finding of Fact 22 and
7 Conclusions of Law C-H, Petitioners assert that the errors claimed might be true without
8 implying that the findings and conclusions are incorrect.²¹

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11 Finally, the Petitioners point out that Exhibit A to the County’s Motion was not part of the
12 record before the Board and, if adopted by the County, might form the basis for another
13 compliance hearing but is not a basis for reconsideration.²²

14 15 **Board Discussion**

16 A motion for reconsideration of a final decision of a board is governed by WAC 242-02-832.
17 It provides that a motion for reconsideration must be based on at least one of the following
18 grounds:

- 19
20 (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking
21 reconsideration;
22 (b) Irregularity in the hearing before the board by which such party was prevented from
23 having a fair hearing; or
24 (c) Clerical mistakes in the final decision and order.

25 WAC 242-02-832(2)

26 ***Factual Error Alleged as Issue 1:*** In the County’s motion, misinterpretation of fact or law
27 is alleged. However, the factual errors the County alleges are based, at least in part, upon
28 evidence that was not presented to the Board. Index Nos. 397, 399, and 428 were not

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30 ¹⁸ *Ibid.*

31 ¹⁹ *Ibid.*

32 ²⁰ *Ibid.*

²¹ *Ibid* at 3.

²² *Ibid.*

1 presented to the Board. They are listed on the County's Index but were not attached to any
2 brief. Board rules and the prehearing order in this case make clear that evidence consists
3 of "the exhibits cited in the briefs and *attached thereto*." (emphasis added) ²³ The County
4 itself relies upon this principle in the stormwater management aspects of this case, when it
5 seeks to strike Petitioners' arguments that are based on documents in the Index but not
6 submitted with the briefs.²⁴
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8 The County also references "oral testimony at the time of hearing" as being part of the
9 record in this case. Again, the County relies upon evidence that was not presented to the
10 Board. The County's representative, Mr. Emmett Dobey, was allowed to present arguments
11 on behalf of the County but was not allowed to present additional evidence in his argument.
12 While the Board rules allow for testimony, such testimony must be given under oath.²⁵ Not
13 only did the County expressly agree that there would be no new evidence offered through
14 Mr. Dobey's presentation, Mr. Dobey did not give sworn testimony in any event. Therefore,
15 reference to "oral testimony" as a basis for reconsideration is outside the record and not a
16 proper basis for reconsideration.
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19 However, on reconsideration, the Board agrees that the County submitted evidence of
20 funding for Phase I of the Belfair Sewer Improvements in excess of the \$18 million
21 described in the Sewer Plan (on which the Board relied). Exhibit 446 shows \$10,300,000
22 appropriated directly by the Legislature; Exhibit 470 shows \$3,200,000 allotted by CTED;
23 Exhibit 458 shows \$5,500,000 also from CTED; and Exhibit 452 shows \$3,033,500 from
24 Ecology. This yields a total of \$22,033,500 for Phase I.
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27 ***Conclusion as to Factual Error Alleged as Issue 1:*** Based on a reconsideration of
28 Exhibits 446, 452, 458 and 470, Finding of Fact No. 34 will be modified to read as follows:
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31 ²³ WAC 242-02-52001; Prehearing Order.

32 ²⁴ County's Objections, Motion to Strike and Prehearing Brief

²⁵ WAC 242-02-610

1 34. \$22,033,500 has been secured through a combination of state grants and loans.
2 The remainder, \$2,511,500 (\$4,655,919 if “escalated costs” are utilized) “remains to
3 be financed.”

4 Exhibit 428, which was not submitted, would evidently have demonstrated an additional \$2
5 million as a State Tribal Assistant Grant. However, the Board cannot reconsider its decision
6 based on an exhibit that was not part of the evidence submitted since that was not the
7 Board’s error.
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10 ***Errors Assigned as Issue 2:*** Issue 2 of the Motion for Reconsideration alleges that
11 Finding of Fact Nos. 32 and 36 are in error. Finding of Fact No. 32 states:

12 The financing portion of the Sewer Plan contains a plan for Phase I of sewer
13 construction. There is no indication in the Sewer Plan of how future phases of the
14 Sewer Plan might be financed or when.

15 The County admits that no rate structure or connection charges have been established but
16 argues that there is a “clear understanding and intent on the part of the Board of
17 Commissioners and the Belfair community that on-going utility rates and general facility
18 connection will need to be imposed.”²⁶ The County goes on to argue that the plan outlines a
19 proposed structure to finance the sewer, pay for the operation and maintenance costs, and
20 recover capital costs for future sewer construction.²⁷
21

22 However, the County fails to point to the sections of the Sewer Plan that establish a
23 structure to finance the construction of Phase II of the sewer project and the Board
24 continues to be unable to find any such plan. As the Board stated in its original order, we
25 do not doubt the good faith of the County, nor does the Board doubt the County’s intention
26 to finance and build a sewer system for the entire Belfair UGA. The question is whether the
27 Sewer Plan meets the requirements for planning a sewer system that will serve the entire
28 Belfair UGA within the planning horizon of the County’s comprehensive plan. None of the
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32 ²⁶ Mason County’s Motion for Reconsideration Re: Belfair UGA Sewer at 2.

²⁷ *Ibid* at 3.

1 options set forth for funding in the Sewer Plan were adopted and no plan is set forth which
2 describes how and when Phase II will be built. Mr. Dobey clarified at the hearing that there
3 were no estimates for Phase II construction costs or timing, a position which is consistent
4 with the Sewer Plan itself. The wording of Finding of Fact No. 32 may have been confusing
5 on this point in that it suggests that "an indication" might be sufficient, when a plan is
6 required.
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9 Although assumptions may change over the course of the twenty year planning period in the
10 comprehensive plan, a compliant plan must specify the strategy for achieving its goals, not
11 merely express an intention to meet them. As part of the capital facilities element of the
12 comprehensive plan, the Sewer Plan must support the designation of the Belfair UGA in the
13 land use element of the comprehensive plan. This means that it must describe and plan for
14 sewer capital facilities which will serve the entire UGA within the 20-year life of the
15 comprehensive plan. When full funding for Phase I is established, the Sewer Plan for
16 Phase I will meet those requirements. However, the Sewer Plan does not contain estimates
17 of costs, sources of funding, and a time table for constructing the sewer facilities for the rest
18 of the sewer system needed to serve the Belfair UGA (primarily East and North Belfair).
19 That is the meaning of Finding of Fact No. 32 and the Board agrees to modify it to make
20 that clear.
21

22
23 As to Finding of Fact No. 36, it reads:

24 The Sewer Plan lacks at least a six-year plan for financing all of the capital
25 improvements needed to the sewer system for the Belfair UGA.

26
27 Since the County seeks to provide the missing page of the Capital Facilities Plan to address
28 this fact, this finding of fact is better addressed with respect to Error Assigned as Issue 6
29 below.
30

31 ***Conclusion as to Error Assigned as Issue 2:*** To make it plain that the GMA requires a
32 plan for providing urban levels of service throughout the Belfair UGA during the twenty-year

1 planning horizon of the County's comprehensive plan, Finding of Fact No. 32 will be
2 modified to read:

3 The financing portion of the Sewer Plan contains a plan for Phase I of sewer
4 construction. The Sewer Plan lacks an adopted strategy with estimates of cost,
5 sources of funding and timing for constructing and financing Phase II of the Sewer
6 Plan.

7 **Error Assigned as Issue 3:** The County assigns error to Findings of Fact Nos. 16, 19 and
8 22. These findings concern the lack of a strategy for ensuring that public sanitary sewer will
9 be available within 500 feet of new development in East and North Belfair (Finding of Fact
10 No. 16); a lack of reasonable likelihood that properties developed in East and North Belfair
11 will connect to public sanitary sewer in the near future (Finding of Fact No. 19); and the lack
12 of likelihood that development in East and North Belfair will be served by public sanitary
13 sewer within the 3 year forecast for construction of public sewer in the Commercial Core
14 (Finding of Fact No. 22). While the County argues that "future extensions will be financed
15 by the development community", it offers no evidence that Phase II which would serve East
16 and North Belfair, will be constructed in the near future. In fact, there is no schedule for
17 construction of public sanitary sewer to serve East and North Belfair in the Sewer Plan. The
18 County does not, therefore, offer any evidence that Findings of Fact Nos. 19 and 22 are in
19 error.
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23 The County's argument is primarily directed at Finding of Fact No. 16 – the lack of a
24 mechanism for ensuring that public sanitary sewer will be available within 500 feet of new
25 development in East and North Belfair. The County asserts that "general facility charges"
26 will be available for other community-based incentives to encourage and supplement
27 developer-assisted sewer development.²⁸
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29 However, the inter-relationship between developer-assisted sewer development and other
30 mechanisms is not established in the Sewer Plan. In fact, the subject of development
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²⁸ *Ibid* at 4.
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1 outside of Phase I is not addressed directly in the Sewer Plan. Review of the Assessor's
2 Map shows that there are many lands that could be developed in East and North Belfair.
3 Under the Sewer Plan, there is no schedule for providing public sewer service to urban
4 development occurring in East and North Belfair. Absent development occurring within 500
5 feet of an existing sewer line, there is no adopted strategy for connecting urban
6 development in East and North Belfair to the urban services, i.e. the public sewer system.
7 This is what Finding of Fact No. 16 states and the County has shown no plan for connecting
8 the sewer lines unless development occurs within 500 feet of development that has already
9 connected to the public sewer.
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12 **Conclusion as to Error Assigned as Issue 3:** The Board did not err in Findings of Fact
13 Nos. 16, 19, and 22.
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15 **Error Assigned as Issue 4:** The County argues that the Board is concerned with the
16 potential for a "barrier lot" which could create a 500-foot barrier around the property, thus
17 precluding the extension of sewer line indefinitely.²⁹ The County therefore assigns error to
18 Findings of Fact Nos. 16, 18, 21, 24 and 29.³⁰
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20 The Board has already discussed Finding of Fact No. 16. Finding of Fact No. 18 finds that
21 the Commercial Core will likely be served through the 500 feet requirement, thus it is
22 unclear why the County assigns error to it. Finding of Fact No. 21 finds that new
23 development on the periphery of the UGA could occur at any time and that there could be
24 gaps larger than 500 feet between new development and existing connectors. Without a
25 plan or requirement for linking connectors regardless of distance, Finding of Fact No. 21
26 finds a very real potential for outlying subdivisions to be without public sewer for an
27 indefinite period of time. Finding of Fact No. 24 similarly finds that there is no requirement
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32 ²⁹ *Ibid.*

³⁰ *Ibid.*

1 that connectors be built unless within 500 feet. Finding of Fact No. 29 describes MCC
2 17.03.030(C) and the County has not explained why that description is in error.

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4 **Conclusion as to Error Assigned as Issue 4:** The discussion of a “barrier lot” is not
5 relevant. The Board made no such finding. The Board reviewed the maps and the plan and
6 determined that the development regulations allow urban levels of development without
7 urban levels of service for public sewer, and without a time table for obtaining public sewer.
8 This is not error. The Board did not err in Findings of Fact Nos. 16, 18, 21, 24 and 29.

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10 **Error Assigned as Issue 5:** Issue 5 challenges Finding of Fact No. 22 and the related
11 conclusions of law. Finding of Fact No. 22 states:

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13 If North Belfair and East Belfair are allowed to develop on community septic systems,
14 there is no likelihood that they could connect to public sewer even within the 3 year
15 period forecast for construction of public sewer in the Commercial Core. This is
16 because the eastern and northern portions of the UGA are planned to connect to
17 main lines that are not scheduled for construction according to any described time
table or any funding strategy.

18 The County’s argument on this issue does not appear to relate to this finding of fact at all.
19 The County argues that on-site septic systems are “interim” and that the entire UGA will be
20 served by the Belfair Sewer System.³¹ This finding relates to the absence of a time table for
21 constructing public sewer to East and North Belfair, something the County has not provided.
22 The use of community on-site septic systems allows urban levels of development without
23 public sewer and the absence of a time table for constructing public sanitary sewer to serve
24 East and North Belfair means those portions of the UGA may be developed at urban
25 densities without urban levels of service, i.e. public sanitary sewer. The County does not
26 provide any argument to the contrary, but argues that the eventual prospect of public sewer
27 is sufficient.
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³¹ *Ibid.*
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1 **Conclusion as to Error Assigned as Issue 5:** Finding of Fact No. 22 is correct and the
2 challenged conclusions of law arise out of the findings of fact.
3

4 **Error Assigned as Issue 6:** Here the County acknowledges that it failed to provide the
5 Board with the complete 2007-2012 Capital Facilities Plan work sheet for the Belfair Area
6 Sewer Improvement.³² By action of the Board of County Commissioners on July 31, 2007,
7 a six-year capital facilities funding plan was adopted for the Belfair UGA sewer. Since this
8 exhibit was not presented to the Board in the compliance hearing, it may not be a basis for
9 reconsideration now. However, it raises the prospect that the County has taken additional
10 steps to come into compliance with respect to the financing of its capital facilities plan. This
11 is not a basis for reconsideration since this action was not before this Board in the
12 compliance hearing. However, the Board would be willing to set a new and expedited
13 compliance schedule to consider this action if the County so requests.
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16 **Conclusion as to Error Assigned as Issue 6:** The failure to offer the adopted six-year
17 Capital Facilities Funding Plan was not the Board's error. Therefore, the Board cannot
18 accept new evidence on this point on reconsideration. Findings of Fact Nos. 32 and 36 are
19 therefore not in error. However, the Board will set an expedited compliance schedule and
20 hearing to consider compliance based upon the legislative adoption of the six-year funding
21 plan upon the County's request.
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24 ORDER

25 For the reasons set forth above, the County's motion for reconsideration is hereby
26 GRANTED in part and DENIED in part.
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28 Finding of Fact No. 34 of the Compliance Order on Plan and Development Regulations –
29 Sewer in Belfair UGA, dated November 14, 2007, is modified to read as follows:
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32 ³² *Ibid* at 4-5.

1 34. \$22,033,500 has been secured through a combination of state grants and loans.
2 The remainder, \$2,511,500 (\$4,655,919 if "escalated costs" are utilized) "remains to
3 be financed."

4 Finding of Fact No. 32 will be modified to read:

5 32. The financing portion of the Sewer Plan contains a plan for Phase I of sewer
6 construction. The Sewer Plan lacks an adopted strategy with estimates of cost,
7 sources of funding, and timing for constructing and financing Phase II of the Sewer
8 Plan.

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10 All other terms and provisions of the Compliance Order on Plan and Development
11 Regulations – Sewer in Belfair UGA dated November 14, 2007 shall remain in full force and
12 effect.

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14 SO ORDERED this 14th day of December 2007.

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17 _____
18 Margery Hite

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20 _____
21 Holly Gadbow

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23 _____
24 James McNamara

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26 Pursuant to RCW 36.70A.300 this is a final order of the Board.

27
28 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
29 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
30 judicial review may be instituted by filing a petition in superior court according to the
31 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

32 **Enforcement.** The petition for judicial review of this Order shall be filed with the
appropriate court and served on the Board, the Office of the Attorney General, and all

1 parties within thirty days after service of the final order, as provided in RCW
2 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
3 but service on the Board means actual receipt of the document at the Board office
4 within thirty days after service of the final order.

5 Service. This Order was served on you the day it was deposited in the United States
6 mail. RCW 34.05.010(19)
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